In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 391

GEORGE B. PARR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Petitioners in their reply brief rely (pp. 4–9) on two recent decisions of the Court of Appeals for the Second Circuit (*United States* v. *McKeever* and *United States* v. *Zborowski*, both decided November 10, 1959), which, they contend (*Id.*, 1), are in "square conflict" with the decision below. Since the Government was not aware of these decisions when it filed its brief in opposition, a short reply is necessary.

In both of those cases the court of appeals reversed criminal convictions because of the trial court's failure to furnish the defense with portions of the grand jury transcript of certain Government witnesses. But neither case involved the situation here present, where the defendants sought production as of right and without making any attempt to show a particularized need therefor. See our brief in opposition, pp. 16–20.

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In both *McKeever* and *Zborowski*, the trial judge, in accordance with the practice of the second circuit, examined the grand jury transcripts, but concluded that they contained nothing significantly inconsistent with the witness' trial testimony. In each case the court of appeals, on the basis of its examination of the transcripts, reached the contrary conclusion, and therefore held that the trial court's failure to make the inconsistent portions available to the defense was reversible error. The court expressly stated in *McKeever* (Pet. Reply Br. 6a) that the rule in the second circuit is that "After a government witness has testified on direct examination, if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony, the defense may ask the trial judge to examine the witness' grand jury testimony. If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, such part of the minutes is made available to the defendant."

Those cases, therefore, hold only that, in the factual circumstances there present, the discrepancies between the grand jury and trial testimony were sufficiently "material" (*McKeever*, Pet. Reply Br. 7a) or "substantial" (*Zborowski, Id.*, 20a) to require that the inconsistent portions of the grand jury minutes be given to the defense. The court's statement of the practice in the second circuit recognizes that the trial judge's obligation to screen the transcript *in camera* only arises if there is "some basis for supposing that

his grand jury testimony may be at variance with his trial testimony" (*McKeever, Id.*, 6a).

There is nothing in either of these decisions which even suggests, let alone holds, that the defense is entitled to the entire transcript of a witness' grand jury testimony merely upon demand, without even attempting to show "some basis for supposing" that it may be inconsistent with his trial testimony. Nor do they indicate that, if no such showing is made, the trial judge nonetheless is required on his own motion to screen the transcript whenever a defendant requests production.[1] Indeed, in the *Zborowski* case (*Id.*, 22a, fn. 2), the court of appeals distinguished the case at bar on the ground that "[i]n *Parr* the defendant made no request that the court examine the minutes *in camera.*"

There is, therefore, no conflict between *McKeever* and *Zborowski* and the instant case as to what kind of showing would suffice to establish a "particularized need" of a defendant for grand jury transcripts and this Court need not reach that question. For here, as we pointed out in our brief in opposition (pp. 16–20),

[1] In *Travis* v. *United States*, 269 F. 2d 928 (C.A. 10), pending on petition for certiorari, No. 479, this Term, which petitioners also claim to be in conflict with the instant case "on the issue presented here" (Reply Br. 1–2), the defendant requested the trial court to examine the grand jury transcript for inconsistencies (269 F. 2d at 945). The court of appeals held that the request was properly denied, because it did not appear that there was any basis for believing that the grand jury testimony would prove materially inconsistent with the trial testimony. The decision below, therefore, is not in conflict with *Travis*, since in the instant case there was neither a request for inspection nor any showing of particularized need.

petitioners made no attempt to show any such need, but sought the entire transcript of the witness' grand jury testimony as of right; and they did not request the trial judge to screen the transcript for possible inconsistencies. Although petitioners now contend (Reply Br. 2) that defense counsel "was just starting to justify this request [for the transcript] when the trial judge cut off all argument by announcing that in his view the transcript was absolutely privileged," we submit that the portions of the record set forth below—coming as they did at the end of an extensive colloquy concerning the production of Heras' other out-of-court statements (Br. in Opp. 20, fn. 11)—conclusively show that the trial judge did not cut off argument on this point. The record shows that petitioners relied solely on their blanket demand for production, the same basis on which they sought the out-of-court statements made by Heras which were furnished to them.[2] In the circumstances, we believe that the trial judge's statement, in denying production, that the transcript was privileged meant only that petitioners' demand as of right was not a sufficient justification for breaching the traditional secrecy

[2] Mr. Foreman [defense counsel]: May it please the Court, the first further request we have is for the testimony of this witness before the Federal grand jury.

Mr. WILKEY. Your Honor, it is the Government's position that that is not covered by the Jencks opinion.

The COURT. That is the opinion of the Court. I don't know what the Supreme Court may say about it. Has the Supreme Court said anything about it?

Mr. FOREMAN. Not that I know of. I was——

The COURT. This Court will deny that request.

Mr. FOREMAN. We would like to establish the fact that he

of grand jury transcripts. While petitioners now state (Reply Br. 2) that "cross-examination demonstrated numerous inconsistencies between Heras' testimony at the trial and his previous statements and testimony," they neither renewed their demand for the transcript nor requested the trial judge, because of these alleged inconsistencies, to examine the transcript *in camera*.

In short, as we pointed out in our brief in opposition (pp. 19–20), this case is completely governed by *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, which fully sustains the district court's denial of petitioners' demand for the entire transcript of Heras' grand jury testimony.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

DECEMBER 1959.

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does have this testimony and has it in the courtroom and had it prior to the time the trial started.

Mr. WILKEY. I do not have it in the courtroom, and it is in my office, and until it is——

The COURT. It is my opinion it is privileged, and secret, and I will rule, subject to all risks, that you cannot have it.

Mr. FOREMAN. We would like to know from the prosecuting attorney if there were any other statements or reports relating to the testimony of this witness, Diego Heras, not in his possession and which he has not produced but which he has knowledge of and which are subject to being produced by him should I so desire [VIII, 2441–2442].

U.S. GOVERNMENT PRINTING OFFICE: 1959